

BEFORE

THE PUBLIC SERVICE COMMISSION

OF SOUTH CAROLINA

DOCKET NO. 2019-281-S

IN RE:

Application of Palmetto Utilities, Inc. for
adjustment of rates and charges for, and
modification to certain terms and conditions
related to the provision of sewer service.

**APPLICANT’S RETURN TO OFFICE
OF REGULATORY STAFF MOTION
FOR LEAVE TO FILE TESTIMONY
AND EXHIBITS UNDER SEAL**

Applicant, Palmetto Utilities, Inc. (“PUI”), hereby makes its return to the May 27, 2020, motion of the South Carolina Office of Regulatory Staff (“ORS”) for leave to file under seal an unredacted version of the pre-filed direct testimony of Daniel P. Hunnell, II, along with his proposed testimony Exhibits DPH-9, DPH-10 and DPH-11 (“Motion”). For the reasons set out below, PUI opposes the Motion.

INTRODUCTION

If granted, the Motion will give this Commission’s imprimatur of approval to clear violations of S.C. Code Ann. §58-4-55(A) by ORS. Furthermore, it would allow ORS to circumvent the procedure set out in S.C. Code Ann. §58-4-55(B)(2) by which this Commission rules on ORS’s challenges to objections made by a public utility to ORS’s demands for production of books, records and information. In addition to being tardy (in view of the indisputable fact that ORS has already violated the statute), the Motion (i) repeatedly misstates that this matter involves “discovery,” (ii) incorrectly asserts that PUI “claims confidentiality” when it is entitled to same **as a matter of law**, (iii) is made in support of an effort to give the utterly false impression that PUI has not cooperated with ORS in this proceeding in a manner detrimental to ORS’s ability to discharge its statutory duties, and (iv) effectively seeks an after the fact approval for the usurpation of a Commission prerogative. The Motion should be denied.

FACTS

In the course of this contested case proceeding, ORS has issued to PUI a total of four hundred sixteen (416) separate demands (including subparts) for the production of books, records, and other information pursuant to §58-4-55(A).¹ Of these 416 demands for production, ORS witness Hunnell alone submitted one hundred seventy (170) under the title “Water Operations Requests.” *See* Mot. Ex. A, ¶3.² PUI responded to each and every such demand – often within five (5) business days of their issuance or less -- and at no point did ORS assert to PUI that the books, records and other information did not or do not “disclose full and accurate information.” *Id.*, ¶¶ 4,6. Moreover, even though Commission Order No. 2020-259 in this docket granted PUI’s motion to stay all proceedings, ORS continued to issue, and PUI continued to respond, to demands that it produce, books, records, and other information to ORS under §58-4-55 while this stay was in effect. *Id.*, ¶ 7. ORS has not moved this Commission for any (i) order finding that PUI’s production was not entitled to protection from public disclosure under §58-4-55(A) or (ii) ruling on PUI’s objections to certain of these demands as permitted under S.C. Code Ann. §58-4-55(B)(2). Accordingly, all books, records, and other information produced by PUI to ORS in this matter are confidential, proprietary, and exempt from public disclosure as a matter of law.

Notwithstanding the foregoing, on May 26, 2020, ORS pre-filed with the Commission and served on the parties of record direct testimony and exhibits of Mr. Hunnell which discusses, describes, reproduces, references or attaches copies of PUI’s books, records and other information produced to ORS pursuant to §58-4-55, including objections made by PUI to certain of these requests.³ Although ORS subsequently filed a redacted version of this testimony and exhibits, it

¹ *See* Affidavit of Lauren B. Hutson, June 1, 2020, copy attached hereto and incorporated herein by reference as Return Exhibit “A.”

² The number, scope and substance of Mr. Hunnell’s first one hundred fourteen (114) demands on behalf of ORS were brought to the attention of ORS’s Executive Director and its staff in this matter at a meeting conducted in ORS’s offices on February 19, 2020. *See* Motion Ex. A, ¶ 4. Rather than addressing the issue in a manner consistent with its obligations to facilitate resolutions or act directly or indirectly to resolve disputed issues in matters before the Commission, *see* S.C. Code Ann. §58-4-50(9), ORS permitted Mr. Hunnell to thereafter issue an additional fifty-six (56) demands for production on its behalf. It is therefore perhaps unsurprising that Mr. Hunnell was not properly supervised with respect to the content of his pre-filed direct testimony and exhibits. *Cf.* S.C. Code Ann. §58-4-20(A).

³ *See* Hunnell pre-filed Direct Testimony p. 5, l.22 – p. 6, l. 3.; p.7, ll. 9-10; p.7, l.19 – p. 8, l.2; p. 8, ll. 15-19 and related footnote; p. 11, l.1 and Exh. DPH-7; p.12, ll. 1-6 and related footnote; p. 17, n.10; p. 19, ll. 9-15; p. 20, ll. 5-14; p. 22, ll. 3-5, and proposed Exhibits DPH 9, 10, and 11.

failed to redact all of the matter protected by §58-4-55(A). *See* Hunnell pre-filed Direct Testimony (redacted) p. 5, l.22 – p. 6, l. 3.; p.7, ll. 9-10; p.7, l.19 – p. 8, l.2; p. 8, ll. 15-19 and related footnote; p. 11, l.1 and Exh. DPH-7, and p.22, ll.3-5. This ineffectual effort to “un-ring the bell” is, of course, unavailing.⁴

LAW

Although ORS is statutorily entitled to demand the production of books, records and other information of public utilities in the context of a contested case proceeding, its authority to do so is not unbounded. A public utility is entitled to object to such demands under §58-4-55(B)(2), which then places upon ORS the onus of seeking relief from the Commission “in the same manner in which it addresses objections to discovery issued by the parties to the contested case proceeding.”⁵ That manner is a motion to compel which ORS may submit pursuant to R. 103-835 and Rule 37, SCRCPC. Further, ORS is expressly proscribed from disclosing books, records or other information so produced unless authorized to do so by the Commission under §58-4-55(A). If the Commission “determines that it is necessary to view such documents or information, it shall order [ORS] to file the documents or information with the Commission under seal.” *Id.* But such documents and information “shall not be available for public inspection unless otherwise ordered by the Commission.” *Id.*

While ORS and its “state agency personnel” are permitted to “zealously fulfill their responsibility” in contested case proceedings, they are also required to be “constantly cognizant of their duty ... to do so with equity and integrity.” *State v. Peake*, 353 S.C. 499, 579 S.E.2d 297 (2003). In discharging its statutory duties in contested cases involving rate relief applications of public utilities, ORS may not take “an unprofessional approach to the legitimate financial interests

⁴ In addition, ORS pre-filed with the Commission and served on the parties of record direct testimony and exhibits of its witnesses Charles E. Loy and Christina L. Seale which discuss, describe, reproduce, reference or attach copies of PUI’s books, records and other information produced to ORS pursuant to §58-4-55. *See* Loy pre-filed Direct Testimony p. 6, l.2 – p. 7, l.22 and related footnotes 7, 8, and 9; p. 12, l.14 – p. 13, l.2 and related footnote 12; p. 18, ll.15 – 22, and proposed Exhibit CEL-7. *See* Seale pre-filed Direct Testimony, p. 7, l. 22 – p. 8, l.17; p. 8, l.19 – p.9, l. 3; and p. 9, ll. 12-19. Understandably, none of Mr. Loy’s pre-filed testimony or exhibits nor Ms. Seale’s pre-filed direct testimony is the subject of this Motion as ORS has already unlawfully publicly disclosed portions of PUI’s production to ORS in same. However, PUI has contemporaneously herewith submitted a motion to strike all improper portions of the testimonies and exhibits of Mr. Hunnell, Ms. Seale, and Mr. Loy and for sanctions against ORS for its repeated statutory violations in this regard.

⁵ Despite the suggestion made in Mr. Hunnell’s testimony and in the instant motion, demands for production by ORS under §58-4-55 are not discovery. *See* discussion at p. 5, *infra*.

of South Carolina businesses”⁶ and is required to “provide public utilities a fair rate application proceeding, and make appropriate and reliable recommendations to the [C]ommission.” *Daufuskie Island Utility Company, Inc. v. South Carolina Office of Regulatory Staff*, 427 S.C. 458, 832 S.E.2d 572 (2019). “When ORS fails to meet this responsibility, it necessarily affects the decision-making of the [C]ommission” if that failure is left unaddressed. *Id.* And such a failure amounts to “misconduct” on the part of ORS. *Id.* PUI submits that under the circumstances described above, denial of ORS’s Motion is not only appropriate, but required in order to avoid allowing ORS’s misconduct to “affect [the Commission’s] decision-making in this proceeding” and to provide PUI with “a fair rate application proceeding.” *Daufuskie, supra.*

ARGUMENT

If ORS had any issue with PUI’s responses to demands for production of books, records, or information under §58-4-55(A), it was incumbent upon ORS to raise that matter by way of a motion to compel under Rule 37(a), SCRPC, in accordance with the procedures outlined in §58-4-55(C). Rather than doing that, ORS improperly asserts in the direct testimony of Mr. Hunnell, and Mr. Loy, that PUI’s responses were insufficient and in the course of so asserting, directly contravened the explicit directive of the General Assembly that the books, records, and other information produced to it by PUI in this proceeding be accorded confidentiality and protected from public disclosure unless and until ruled otherwise by the Commission. By its pre-filing and service of Mr. Hunnell’s, and Ms. Seale’s and Mr. Loy’s, direct testimony and exhibits, ORS has blatantly violated the law governing public disclosure of books, records, and other information produced to it by PUI pursuant to §58-4-55 and ignored the Commission’s role in determining matters within the ambit of that statute. Against that backdrop, ORS now belatedly asks the Commission for leave to file the unredacted testimony and exhibits of Mr. Hunnell under seal.⁷ The Motion should be denied.

⁶ One such legitimate financial interest is that which ORS is mandated to preserve, i.e., “continued investment in and maintenance of utility facilities so as to provide reliable and high quality utility services.” *See* S.C. Code Ann. §58-4-10(B).

⁷ As the Commission is aware, ORS filed Mr. Hunnell’s un-redacted testimony and exhibits with the Commission and served them on the other parties of record on May 26, 2020. The fact that ORS re-submitted Mr. Hunnell’s testimony and exhibits in a redacted format is only an acknowledgment that the initially filed and served versions contravene §58-4-55(A).

A. ORS Demands for Production Under §58-4-55 Are Not Discovery

ORS asserts that §58-4-55 is “a discovery process.” Motion at 1. This statement – which is repeated in the testimony of its witnesses -- is incorrect as a matter of law. *See* S.C. Code Ann. §58-4-55(D). And this is not a distinction without a difference as any discovery served by ORS in a rate case proceeding is required to be filed with the Commission under S.C. Code Regs. 103-833, can only be issued consonant with the provisions of the South Carolina Rules of Civil Procedure, including Rule 11(a), SCRCP under S.C. Code Regs. 103-835, and can be entered into evidence under Rule 26(d) and (g)(1), SCRCP. By contrast, there is no provision of §58-4-55(A) which permits the introduction of books, records or information into evidence. To the contrary, the confidentiality requirement of the statute contemplates the exact opposite. Further, the matters which may be discoverable under R. 103-833 and R. 103-835 and the SCRCP are far broader than that which ORS may demand be produced under the statute when it is conducting an “inspections, audits, and examinations” under S.C. Code Ann. §58-4-50(A)(2). *Compare* Rule 26 (b)(1), SCRCP (“[p]arties may obtain discovery regarding **any matter**, not privileged, which is relevant to the subject matter in the pending action ...[even if it] will be inadmissible at the trial”) and §58-4-55(A)(2) (“[t]he regulatory staff ... may require the production of books, records or other information”).

B. The Redacted Testimony and Exhibits are Confidential as a Matter of Law

In an apparent attempt to cast this as a simple matter of confidentiality, *cf.* Rule 26(c)(7), SCRCP, ORS variously states that PUI “maintains,” “asserts,” and “claims” that the redacted testimony and exhibits of Mr. Hunnells are “confidential and protected from disclosure.” Motion at 1,2. This is, of course, a false premise as there is no issue presented by the Motion involving **claims** by PUI to confidential treatment and exemption from public disclosure with respect to its production to ORS under §58-4-55(A). That status and entitlement already exist as a matter of law under the statute and ORS’s suggestion to the contrary is erroneous.

C. Disclosing the Material Will Be Unduly Prejudicial to PUI

Without citation to authority supporting that it is a standard by which this Motion should be decided by the Commission, ORS contends that “disclosure of the material will not be unduly prejudicial to the Company.” Motion at 1. Under Rule 403 of the South Carolina Rules of Evidence (SCRE), “relevant ...evidence may be excluded if its probative value is substantially

outweighed by the danger of unfair prejudice.” But this Motion does not present any evidentiary issue.⁸ And there are several other bases upon which the Commission should reject this contention.

First and foremost, notwithstanding ORS’s repeated references to “disclosure” (Motion at 1), the Motion is one for leave to file the redacted testimony and exhibits with the Commission under seal, not to make “documents or information ... available for public inspection.” There is a clear distinction between filing under seal and disclosure under §58-4-55(A) which has been muddled by ORS. *Compare* Motion at 2. Regardless, the Commission should do neither of these things as ORS has failed to demonstrate any basis upon which the full protections of the statute should be denied to PUI.

Second, the fact that the General Assembly has seen fit to make books, records and other information produced to ORS under §58-4-55(A) “confidential or proprietary” necessarily reflects a legislative determination that it is harmful to a public utility – i.e., prejudicial – to have this information publicly revealed. An unlawful disclosure (which has already occurred in this and other instances involving ORS witness testimonies⁹) is undoubtedly an “unduly prejudicial” disclosure. The Commission should eschew sanctioning ORS’s efforts to further circumvent the statute. *Cf. Daufuskie, supra* (“[i]n this case, ORS made recommendations to the commission which the commission accepted”).

Third, ORS’s goal in seeking to file under seal is to further its effort to paint a blatantly false narrative with respect to PUI’s cooperation in this matter and the ability of ORS’s witnesses to conduct the audits, inspections and examinations required of it in this proceeding. Examples of this are provided in PUI’s contemporaneously filed Motion to Strike and For Sanctions (“PUI Motion to Strike”), which is incorporated herein by reference. *See* PUI Motion to Strike at pp.4-6. A particularly egregious example of the lengths to which ORS appears prepared to go in depriving PUI of a fair proceeding is found at p. 12, ll. 1-6 of Mr. Hunnell’s pre-filed testimony. There, Mr. Hunnell purports to describe a “discovery” (*sic*) inquiry made to PUI and an answer that PUI gave. However, and as is plain on the face of this inquiry and PUI’s response, ORS did

⁸ But ORS’s argument in this regard does serve to highlight the distinction between discovery and production under §58-4-55(A) as the rules for the former expressly provide for the production of matter even if it will be inadmissible at trial. *See* Rule 26(b)(1), SCRCP.

⁹ PUI is, of course, alluding to the subject matter of its contemporaneous motion to strike and for sanctions against ORS in this docket which is incorporated herein by reference.

not ask if PUI had performed a cost of service study (“COSS”) and PUI necessarily did not state that it had not performed such a study. *See* Return Exhibit “B,” copy attached and incorporated herein by reference.¹⁰ Nor, and also contrary to Mr. Hunnell’s statement, did PUI state that it performed no other analysis regarding its currently approved rate design. To the contrary, the Company gave a fulsome (fifteen line) answer explaining that its analysis in this regard was the same as that adopted by the Commission in the Company’s last rate order and the specific reasons why it believed no alternative rate design could be employed under the circumstances.¹¹ And the sin here is more than simply misrepresenting to the Commission the matter subsumed within this demand for production under §58-4-55(A) and the PUI response (which is certainly not venial in nature), but it involves a conscious determination to selectively attach certain portions of PUI’s production to ORS under §58-4-55(A) when it suits ORS’s purpose but to withhold other portions which cast ORS’s assertions and positions in a wholly different light. This demonstrates that ORS is not exercising the “integrity and equity” required under *Peake, supra*, but the exact opposite. Granting ORS’s motion will only further prejudice PUI in its ability to obtain a “fair rate application proceeding.” *Daufuskie, supra*

D. There is No Need for the Commission to View the Redacted Testimony and Exhibits

ORS contends that the redacted testimony and exhibits “relate to” or are “pertinent to” its positions and adjustments it will propose in this case. Motion at 2. As stated above and in the PUI Motion, this is a ruse to allow ORS to perpetuate the myth that PUI did not cooperate in the ORS audit, examination, and inspection in this case. Notably, ORS never asserts that it will be prejudiced – “unduly” or otherwise – in the presentation of its case if the Commission does not view the redacted matter. Even if that were the case, denial of this Motion would be a just result given the inequity of ORS’s conduct in repeatedly violating the provisions of §58-4-55(A) in this case as set out in the PUI Motion. *See Peake, supra*.

¹⁰ Having little choice but to do so in view of Mr. Hunnell’s misrepresentation, but without waiving any of its rights under §58-4-55(A), PUI attaches as part of Return Exhibit “B” a copy of its response to ORS Second Request for Production of Books Records and Other Information number 2-25 that is referenced by Mr. Hunnell.

¹¹ Also not acknowledged by Mr. Hunnell, but certainly noteworthy, is the fact that ORS recommended to the Commission that it adopt the current flat rate design in PUI’s last rate case – even after it analyzed the effects upon customers previously charged a consumption-based rate. *See* Transcript of Hearing, January 17, 2018, Vol. 2, Docket No. 2017-228-S, p.386, l.8 – p.387, l.16.

Nonetheless, ORS does not – and indeed cannot -- demonstrate that “it is necessary [for the Commission] to view such documents or information” as is required by §58-4-55(A). This is so because the determination of whether any such necessity exists lies with the Commission – not ORS. In fact, the statute does not even contemplate that ORS can make such a motion. At best, the Commission should make a determination of its need to view the protected information only after it considers the PUI Motion and the exhibits and testimony of all of ORS’s witnesses.

E. PUI’s Opposition is Not Borne Out of Fear, but Justice

Lastly, PUI wishes to make clear that it does not oppose the viewing of the redacted testimony or exhibits out of any fear that this Commission will not treat it fairly. Rather, its opposition is based upon the fact that ORS has **repeatedly** contravened the clear statutory charge that it not disclose books, records or information produced to it by PUI in this case under §58-4-55(A). *See* PUI Motion. Granting ORS’s Motion will reward it for its misconduct and the Commission should refuse to allow itself to be inveigled into accepting ORS’s recommendation under these circumstances. *Daufuskie, supra*.

CONCLUSION

For the reasons set forth above and in PUI’s Motion, the Commission should deny this motion.

Respectfully submitted,

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 This 5th day of June, 2020